2. After a Year of Compiling a Record on the Issue, the Commission Still Can Articulate No Current Justification for the Rule

The Court in *Cincinnati Bell* found that the record in the PCS docket did not support retention of the cellular separate subsidiary rule.[70] The FCC was unable to articulate any valid basis for keeping the rule. Based on the FCC's equation of PCS with cellular, the Court stated that if the record indicated that the public interest would be served by not prescribing a separate subsidiary rule for PCS, there should be no such rule for cellular, in the absence of a valid reason for the disparity.[71]

On remand, the Commission now claims that it has been compiling a supplemental "record . . . on the question of the continued need for Section 22.903" consisting of a series of waiver requests and responsive pleadings dating back to August 1995, when BellSouth filed its waiver request.[72] Its *summary* of this record, while incomplete (it fails to address several BellSouth filings), takes up 8 single-spaced pages.[73] Nothing in this supplemental record, however, supports retention of the cellular rule. As BellSouth has previously shown, no commenter has been able to demonstrate, either in the PCS docket or in response to the waiver requests, that consumers will be harmed by BOC provision of cellular service without structural separation.[74] The supplemental record consists of attempts by competitors to prevent BOCs from providing one-stop shopping by submitting unsupported speculative claims. They submitted no evidence, however, that a BOC providing cellular service is more able or likely to engage in abuses than a BOC providing PCS service. These speculative claims did not justify structural separation for PCS and they do not

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70 69 F.3d at 767-68.

71 *Id.* at 768.

72 *NPRM* at ¶ 25.

73 *NPRM*, Appendix A.

74 BellSouth Brief, *BellSouth Corporation v. FCC*, Case Nos. 94-4113, 95-3315 (consolidated with *Cincinnati Bell*), at 7-15 (May 1, 1995); BellSouth Reply to Comments in Response to Request for Resale Authorization (Sept. 25, 1995).

justify it for cellular. The Commission acknowledged as much when it said in the *NPRM* that after reviewing the supplemental record it was still "not able to determine whether our current requirements . . . [are] warranted."[75]

To impose a structural separation requirement uniquely on BOC provision of cellular service, the Commission must have a record supporting the need for imposing restrictions solely on the BOCs, and no other LECs, and on their cellular service, not their other CMRS. Simply put, there is no such record. To the extent that the waiver-related filings have any relevance at all,[76] they do not provide a scintilla of evidence supporting imposition of a structural separation requirement on BOC provision of cellular service. In fact, these filings demonstrate, through their failure to supply any factual evidence warranting the need for such a rule, that the rule serves no valid purpose.

In particular, none of the filings opposing BOC waiver requests supplied evidence that there was any justification for imposing a structural separation requirement on the BOCs in particular. Indeed, AT&T acknowledged that there appeared to be "no basis for distinguishing" between BOCs and other LECs.[77] None of the commenters opposing BellSouth's waiver request provided any evidence that any of the BOCs had engaged in discriminatory cellular interconnection practices or cross-subsidized cellular service from local exchange revenues. Moreover, none of these commenters demonstrated that the lack of a structural separation requirement for non-BOC LECs' cellular operations had led to discriminatory cellular interconnection practices or cross-subsidies.

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75 *NPRM* at ¶ 48.

76 These filings concern whether particular waiver requests should be granted or denied. Such filings generally address whether there are unique factual circumstances demonstrating that the public interest would be served by a waiver of a rule and whether waiver of the rule in a particular case would undermine the purpose of the rule. *See* 47 C.F.R. § 22.119(a); *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). Accordingly, filings concerning waivers are unlikely to establish a record on the continued need for a rule.

77 AT&T Comments on BellSouth waiver at 6 n.11.

The failure of these commenters to provide any evidence that the rule was needed to accomplish its asserted purpose makes clear that there is no need to impose structural separation either on the BOCs alone or on LECs in general. BellSouth hereby incorporates by reference its reply to the comments on its resale request, a copy of which is appended hereto as Attachment I.[78]

The Commission's synopsis of the record on BellSouth's waiver request (Appendix A to the *NPRM*) supports this conclusion. The synopsis indicates that several commenters came up with hypothetical ways in which a LEC could conceivably cross-subsidize cellular service, but there is no citation of any evidence that LECs have done so or are likely to; nor is there any citation of evidence that BOCs are uniquely positioned to cross-subsidize cellular service.[79] The synopsis notes that several commenters submitted information concerning findings in audits and other reports concerning cross-subsidies, but none of these concerned cross-subsidization of *cellular* service in particular.[80] In fact, the synopsis admits that a study submitted by one of the commenters specifically addressed only the potential for LEC cross-subsidization of video dialtone service.[81] This is plainly not relevant to whether BOCs in particular should be subject to structural separation for their *cellular* services.

BellSouth showed in its reply to these comments that these same parties did not find the potential for cross-subsidization to be a basis for imposing structural separation on LEC provision of PCS.[82] Indeed, Sprint had argued in the PCS docket that concerns about LEC cross-subsidization

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78 In addition, BellSouth includes as Attachment II a copy of its February 15, 1996 letter responding to a January 18, 1996 joint *ex parte* filing in Gen. Docket 90-314 by Cox Enterprises, Inc., Comcast Corporation, and AirTouch Communications, Inc., which was cited in footnote 59 of the *NPRM* as the "Joint Safeguards *Ex Parte*"; footnote 62 of the *NPRM* notes other parties's responses to this filing but omits any reference to BellSouth's response.

79 *NPRM* at A-4.

80 *Id.* at A-4 - 5 & nn.18, 19.

81 *Id.* at A-5 & n.21.

82 *See* Attachment I at 25-26.

were mere "speculat[ion]" and said that "[t]o the extent the Commission has any competitive concerns regarding the provision of PCS by LECs, it can apply non-structural safeguards, as necessary. . . . The best balance for the Commission to strike is one that permits LECs to incorporate innovative personal communications service technologies with local service provision."[83] BellSouth also demonstrated the speculative nature of the cross-subsidy policy concerns raised by the commenters, and responded fully thereto.[84]

The Commission's synopsis of the record compiled in the BellSouth waiver proceeding on interconnection abuse further demonstrates that there is no record evidence either (1) that the BOCs in particular are likely to engage in discriminatory interconnection practices absent a structural separation requirement or (2) that the absence of a structural separation requirement for non-BOC LECs' cellular operations has led to discriminatory interconnection practices. BellSouth's reply to the comments on its waiver request demonstrated that most of the concerns raised in the comments involved interconnection issues from the early days of cellular that had long been resolved; that the remaining concerns by the commenters were purely speculative; that the Commission's existing CMRS interconnection policies fully addressed the policy concerns that were raised; and that the same commenters, in other dockets, had not found structural separation necessary to prevent discriminatory interconnection practices.[85]

The Commission's discussion in the text of the *NPRM* concerning the record to date points to *no factual evidence* of any need for the imposition of structural safeguards on BOCs for their provision of cellular service.[86] It is noteworthy, in this connection, what the Commission's

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83 Reply Comments of Sprint, GN Docket 90-314, at 13-14 & n.27 (Jan. 8, 1993).

84 *See* Attachment I, Appendix at 31-35.

85 *See* Attachment I at 16-23.

86 *NPRM* at ¶¶ 25-30, 37-52.

discussion of the record before it does *not* contain—namely, evidence warranting different structural regulation policies for BOCs than for non-BOC LECs, or different structural regulation policies for cellular and PCS:

- The Commission cites *no evidence* that BOCs have any greater market power in their local exchange areas than other incumbent LECs.
- The Commission cites *no evidence* that BOCs have any greater opportunity or incentive than other incumbent LECs to discriminate in providing unaffiliated wireless service providers with interconnection.
- The Commission cites *no evidence* that BOCs have any greater ability than other incumbent LECs to engage in price discrimination.
- The Commission cites *no evidence* that BOCs have any greater incentive or opportunity than other incumbent LECs to cross-subsidize their cellular operations.
- The Commission cites *no evidence* that BOCs have any greater ability than other incumbent LECs to leverage their local exchange market power into wireless markets.[87]
- The Commission cites *no evidence* that justify treating the BOCs' cellular and PCS offerings differently—indeed, its discussion of the different treatment of cellular and PCS does not even refer to the record compiled over the last year.[88]

3. The FCC's Interconnection Policies Obviate Interconnection Concerns as a Basis for BOC Cellular Safeguards

The Commission has never found structural separation to be essential for prevention of discriminatory LEC interconnection practices with respect to commercial mobile services.[89] It does

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[87] *Id.* at ¶¶ 42-47.

[88] *See id.* at ¶ 108.

[89] Imposing structural separation on all LECs for the provision of cellular service may have been justifiable in 1981, given that only the most elementary cellular interconnection policies had been developed at that time. Similarly, there may have been a legitimate basis for imposing structural separation on AT&T's cellular operations alone in 1982, given AT&T's unified national network for the provision of local exchange and interexchange service and the fact that cellular interconnection policies were still in their infancy. Even so, the Commission did not find that structural separation was *essential* to prevent discriminatory interconnection practices; rather, structural separation was a prophylactic measure adopted in light of the newness of the industry. *See Cellular Reconsideration Order*, 89 F.C.C.2d at 79-80; *Cellular Communications Systems*, 86

not require structural separation for BOC provision of PCS or SMR service, and it does not require structural separation for non-BOC incumbent LECs' provision of any CMRS. Instead, it relies exclusively on the interconnection policies that it has developed over the years.

The FCC's policies governing cellular interconnection have long assured cellular providers of fair and reasonable interconnection of their systems with the LEC wireline network.[90] These policies worked so well that in 1994 the FCC extended them to all commercial mobile radio services, including PCS and SMR service.[91] Indeed, even AT&T and McCaw acknowledged that the Commission's LEC-CMRS interconnection policies, which applied identically to BOCs and other incumbent LECs not subject to structural separation, had worked well.[92] In 1995, the Commission noted that these interconnection policies were sufficient to prevent interconnection discrimination and pointed to the absence of "any pending complaints alleging discriminatory interconnection filed by unaffiliated cellular providers against wireline carriers with cellular affiliates."[93]

F.C.C.2d at 493-95.

90 *See Need to Promote Competition and Efficient Use of Spectrum*, 59 Rad. Reg. 2d (P & F) 1275 (1986), *recon.*, 2 F.C.C.R. 2910 (1987), *further recon.*, 4 F.C.C.R. 2369 (1989).

91 *CMRS Second Report*, 9 F.C.C.R. at 1497-1501.

92 *See* Comments of AT&T, CC Docket 94-54, at 12-13 (Sept. 12, 1994) (stating that the "current process of private, good faith negotiations between cellular service providers and LECs . . . appears, for the most part, to be working satisfactorily . . . [and] afford[s] LECs the flexibility to meet the diverse and evolving needs of CMRS providers"); Comments of McCaw, CC Docket 94-54, at 24 n.58 (Sept. 12, 1994) (noting that "LECs and cellular carriers . . . have indicated that they are satisfied with the current system" of interconnection policies enforceable through the complaint process, and that "[t]he success of this process is further demonstrated by the relatively few complaints received by the Commission in connection with cellular/LEC interconnection arrangements").

93 *SMR Eligibility Order*, 10 F.C.C.R. at 6293.

Recently, the Commission adopted new policies to govern LEC-CMRS interconnection in its *Local Competition* docket, in response to the 1996 Telecom Act.[94] In its *Interconnection Order* in that docket, the Commission held that CMRS providers are "telecommunications carriers" providing "telephone exchange service" and have the same interconnection rights, and are subject to the same policies, procedures, and safeguards, as other competing providers of telecommunications service under new Sections 251 and 252 of the Communications Act.[95]

These sections, and the rules adopted in the *Interconnection Order,* establish a comprehensive scheme that was intended to ensure fair and evenhanded interconnection between the incumbent local exchange carrier and competing providers of service. That scheme is *not* premised on the application of structurally separated affiliates for BOC provision of cellular service. In fact, given that the same comprehensive policies govern LEC provision of interconnection to cellular, PCS, SMR, and other CMRS providers, there can be no basis for asserting that structural separation is somehow necessary to prevent interconnection abuses in cellular but not in other CMRS services.

Moreover, neither the preexisting CMRS interconnection policies nor the policies contained in Section 251-52 and the *Interconnection Order* have been premised on any greater concern about interconnection abuse by BOCs than any other LEC. Concerns about discriminatory interconnection are equally applicable to all LECs in their own local exchange areas. Congress and the FCC have, accordingly, addressed interconnection concerns by adopting interconnection policies that provide safeguards equally applicable to all LECs. There is no need to superimpose on these interconnection

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94 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket 96-98, *First Report and Order,* FCC 96-325 (Aug. 8, 1996) (*Interconnection Order*), *pets. for recon. pending, pets. for review pending sub nom. Iowa Utilities Board v. FCC,* No. 96-3321 (8th Cir. filed Sept. 6, 1996).

95 *Id.* at ¶¶ 1008, 1012-15, 1022-26.

policies an additional structural safeguard applicable only to the BOCs and only to their provision of cellular service.

4. Analysis of the Factors Cited in the *NPRM* Demonstrates There Is No Need for Section 22.903

(a) Interconnection

As discussed in the preceding section, prevention of interconnection discrimination is no longer a justification for structural separation, if it ever has been since the Commission developed and refined its cellular interconnection policies. The Commission found in 1994 that its cellular interconnection policies had worked so well that it extended those policies to all CMRS services, including services such as SMR and PCS where there are no structural separation requirements for BOCs or other LECs.[96] The fact that the system of negotiated interconnection agreements, arrived at with an understanding of FCC policies, has worked well is demonstrated by the fact that LECs and wireless carriers alike filed comments in CC Docket 94-54 attesting to the success of this approach.[97]

As noted in the *NPRM*, the *LEC/CMRS Interconnection Compensation NPRM* suggested that the preexisting interconnection safeguards may have been insufficient.[98] The latter rulemaking notice, however, provided no evidentiary support for this departure from the Commission's 1994 determination that the cellular interconnection policies had worked so well they should be extended

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[96] *See CMRS Second Report*, 9 F.C.C.R. at 1497-1501.

[97] *See, e.g.*, the following Comments filed in CC Docket 94-54 on September 12, 1994: CTIA Comments at 21; McCaw Comments at 23; PCIA Comments at 11; Western Comments at 7; GTE Comments at 37-45; AT&T Comments at 12-13; RTC Comments at 8; AirTouch Comments at 12; Vanguard Comments at 21; ALLTEL Comments at 7-8; NYNEX Comments at 11-12; Bell Atlantic Comments at 13-14; Dial Page Comments at 6; PageNet Comments at 8-9; and APC Comments at 4-5.

[98] *See Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket 95-185, *Notice of Proposed Rulemaking*, 11 F.C.C.R. 5020 (1996) (*LEC/CMRS Interconnection Compensation NPRM*), *cited in NPRM* at ¶ 43.

to all CMRS, and it failed to acknowledge the widespread support for the existing interconnection policy in Docket 94-54. Moreover, the Commission ultimately did not adopt the radical, confiscatory "bill and keep" scheme proposed in the *LEC/CMRS Interconnection Compensation NPRM*—instead, the *Interconnection Order* held that CMRS-LEC interconnection was to be governed by new Sections 251-52 and the Commission's implementing rules. Significantly, the *Interconnection Order* did *not* make any finding that the preexisting CMRS interconnection policies were insufficient to protect against interconnection price discrimination and furthermore made no finding that the presence or absence of cellular structural separation had any relevance to the effectiveness of interconnection policies.

The *NPRM* suggests that a structural separation requirement or a non-structurally separated affiliate requirement may serve to highlight the interconnection arrangements between a LEC and its cellular operations.[99] This suggestion was propounded before the Commission had adopted the *Interconnection Order*, however, and has been rendered moot by the new regulatory scheme. Now that the Commission has determined that Sections 251 and 252 apply to LEC-CMRS interconnection, there is no need for the use of a separate affiliate, structural or otherwise. Under the interconnection scheme established by the new statute, all LEC-CMRS interconnection agreements must be reduced to writing and reviewed by state officials, and their terms are available to other carriers on a nondiscriminatory basis.

(b) Price Discrimination

The *NPRM* suggests that if BOCs are not required to separate their LEC and CMRS operations, they will have opportunities to engage in price discrimination.[100] The *NPRM* fails to indicate what price discrimination opportunities are of particular concern, however. Historically,

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99 *NPRM* at ¶ 43.

100 *NPRM* at ¶ 44.

the only price discrimination concern underlying the BOC structural separation requirement relates to the price of interconnection. This has now been addressed in a comprehensive manner by both Congress and the Commission in Section 251-52 and the *Interconnection Order.*

The only citation in the NPRM concerning the potential for price discrimination as a basis for requiring structural separation is the 1983 *BOC Separation Order.*[101] That thirteen-year-old decision, however, was adopted in the *Computer II* era, when the Commission found it necessary to rely on structural safeguards for CPE and enhanced services, as well as cellular service, because adequate non-structural safeguards had not yet been developed. Since 1983, the Commission has adopted a wide variety of new accounting and cost-allocation rules, affiliate-transaction rules, and other non-structural safeguards that have rendered structural separation unnecessary. Requiring structural separation now, merely because in 1983 there were not sufficient non-structural safeguards, would ignore the last decade's experience showing that nonstructural safeguards are more beneficial to the public interest than structural separation.[102]

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101 *See NPRM* at ¶ 44 n.81 (*citing BOC Separation Order,* 95 F.C.C.2d at 1129).

102 See *PCS Second Report,* 8 F.C.C.R. at 7751-52; *Separation of Costs of Regulated Telephone Service for Costs on Nonregulated Activities,* 2 F.C.C.R. 1298 (1987) (*Joint Cost Order*), *recon.*, 2 F.C.C.R. 6283 (1987), *further recon.*, 3 F.C.C.R. 6701 (1988), *aff'd sub nom. Southwestern Bell Corp. v. FCC,* 896 F.2d 1378 (D.C. Cir. 1990); *see also Amendment of Section 64.702 of the Commission's Rules and Regulations ("Computer III"),* CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986) ("*Phase I Order*"), *recon.*, 2 F.C.C.R. 3035 (1987) (*"Phase I Recon. Order"*), *further recon.*, 3 F.C.C.R. 1135 (1988) (*"Phase I Further Recon. Order"*), *second further recon.*, 4 F.C.C.R. 5927 (1989) (*"Phase I Second Further Recon. "*), *Phase I Order and Phase I Recon. Order vacated, California v. FCC,* 905 F.2d 1217 (9th Cir. 1990) (*"California I"*); Phase II, 2 F.C.C.R. 3072 (1987) (*"Phase II Order"*), *recon.*, 3 F.C.C.R. 1150 (1988) (*"Phase II Recon. Order"*), *further recon.*, 4 F.C.C.R. 5927 (1989) (*"Phase II Further Recon. Order"*), *Phase II Order, vacated, California I,* 905 F.2d 1217 (9th Cir. 1990); *Computer III Remand Proceedings,* 5 F.C.C.R. 7719 (1990) (*"ONA Remand Order"*), *recon.*, 7 F.C.C.R. 909 (1992), *pets. for review denied, California v. FCC,* 4 F.3d 1505 (9th Cir. 1993) (*"California II"*); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards,* 6 F.C.C.R. 7571 (1991) (*"Computer III Remand"*); *BOC Safeguards Order vacated in part and remanded, California v. FCC,* 39 F.3d 919 (9th Cir. 1994) (*"California III"*), *cert. denied,* 115 S.Ct. 1427 (1995).

Moreover, the *NPRM* does not indicate that there is any evidence that LECs—either the BOCs or the non-BOC LECs who were not subject to structural separation—have actually engaged in price discrimination concerning CMRS since 1983. The *NPRM* only reiterates a 1983 concern that "opportunities" for discrimination may exist. There is no basis for utilizing the mere decade-old concern about possible price discrimination as a basis for imposing a structural separation or separate affiliate requirement on the BOCs today, after a decade of experience shows that concern to have been unfounded.

Finally, the discussion in the *NPRM* about price discrimination does not provide any basis for treating BOCs any differently from other LECs. Indeed, the *NPRM* expresses concern about "the possibility of discrimination by a BOC *or incumbent LEC*,"[103] thereby acknowledging that there is no basis for singling out BOCs for a structural or non-structural separation requirement. Moreover, the discussion of this subject expresses concern only about discrimination "in favor of [a BOC's or LEC's] own cellular operations and against other CMRS providers,"[104] but gives no reason why a BOC's or LEC's *cellular* operations are a matter of particular concern, while the same company's SMR or PCS operations do not present exactly the same concerns. In short, the Commission has no basis for having greater concern for price discrimination by BOCs than by other LECs, and it has no basis for having greater concern for price discrimination in cellular than in other forms of CMRS. As a result, concern about price discrimination cannot form a basis for imposing special safeguards on BOC cellular operations. There is nothing unique about the BOCs and their cellular operations that justifies singling them out for separation, structural or non-structural, with respect to price discrimination.

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103 *NPRM* at ¶ 44 (emphasis added).

104 *Id.*

(c) Cross-subsidization

The *NPRM* notes that one historical basis for cellular structural separation was the prevention and detection of cross-subsidies flowing from monopoly local exchange service to the competitive cellular operations of BOCs. It acknowledges, however, that there have been many developments in the last decade that "go far in reducing the possibility of undetected cost-shifting."[105] Indeed, the nonstructural safeguards adopted in the *Joint Cost Order,* including cost allocation standards, affiliate transaction rules, accounting and auditing procedures, eliminate opportunities to cross-subsidize cellular service from regulated local exchange revenues without detection.[106] Moreover, the replacement, in large part, of rate-base/rate-of-return regulation by price caps has effectively eliminated any incentive to engage in cross-subsidization.[107] Accordingly, as the Commission has found in *Computer III,* such non-structural safeguards are adequate to protect the public from cross-subsidization, and structural separation is not necessary.[108]

The Commission's concern that there is still some potential for cost-shifting from competitive cellular service to "as-yet primarily monopoly local exchange service"[109] is unfounded for several reasons:

- First, cellular service has been provided side-by-side with non-BOC local exchange service, without any structural separation, for thirteen years. The NPRM cites not a single documented instance of cross-subsidization in all that time.

- Second, local exchange service is unlikely to be a source of subsidies. The price of this service is highly regulated, and in many cases is itself subsidized from other,

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105 *NPRM* at ¶ 46.

106 *See* 2 F.C.C.R. 1298 and orders on reconsideration, cited in note 102, *supra.*

107 *See Price Cap Performance Review for Local Exchange Carriers,* CC Docket No. 94-1, *First Report and Order,* 10 F.C.C.R. 8962 (1995); *see also Policy and Rules Concerning Rates for Dominant Carriers,* CC Docket No. 87-313, 5 F.C.C.R. 6786 (1990), *recon.,* 6 F.C.C.R. 2637 (1991), *aff'd sub nom. National Rural Telecom Assoc. v. FCC,* 988 F.2d 174 (D.C. Cir. 1993).

108 *See* note 127 *supra.*

109 *NPRM* at ¶ 46.

more competitive services in order to ensure the availability of universal service. Under these circumstances, there is little basis for concern about subsidies flowing from local exchange service into cellular.

- Third, meaningful local exchange bypass and competition in the provision of local exchange service is rapidly becoming a reality, making monopoly revenues a thing of the past. Large and even medium-size business accounts often have direct leased-line connections to interexchange carriers, bypassing the "monopoly" LEC and eliminating a historical source of access revenue. Moreover, competitive local exchange service was developing even before passage of the 1996 Telecom Act, and is rapidly being deployed since that Act's passage. BellSouth has already entered into agreements with numerous companies planning to provide competitive local exchange service. Under these circumstances, LECs are under competitive pressure from both actual and potential competitors to keep their local exchange prices down, ensuring that the "monopoly local exchange service" is not a source of funds for subsidizing cellular service, even now.

Finally, the *NPRM* again does not cite any evidence indicating why existing non-structural safeguards may be inadequate to prevent or detect cross-subsidization only in the case of BOCs, as opposed to other LECs. Similarly, the *NPRM* provides no support for why the BOCs' ability to cross-subsidize only cellular service, and not PCS or SMR service, is a matter of particular concern. Under these circumstances, the Commission cannot base its BOC cellular structural separation rule on its concern for cross-subsidization.

(d) Leveraging of Market Power

Next, the *NPRM* raises the possibility that "integrated landline and cellular operations" may provide "incentives and opportunities . . . for leveraging of the LEC's local exchange market power into the more competitive cellular and, more generally, CMRS market."[110] Noting that cellular market share is roughly equally divided between wireline and non-wireline carriers, the Commission inquires as to the role structural separation may have played, and whether the market might have developed differently without it.[111]

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110 *NPRM* at ¶ 47.

111 *Id.*

No commenter can tell the Commission with any certainty how the market shares might have developed without BOC structural separation. One thing is clear, however: non-BOC wireline cellular carriers, who have not been subject to structural separation, hold many of the wireline licenses, and these wireline carriers have the same potential for leveraging their monopoly local exchange market power as BOCs would have without structural separation, yet there is no evidence of abuse. One of these wireline carriers is GTE, which has more extensive LEC operations than any single BOC and is one of the largest cellular operators as well. If a lack of structural separation is actually likely to result in leverage of a LEC's local exchange monopoly, there surely would have been evidence over the last decade that GTE or some other non-structurally-separated LEC had taken anticompetitive advantage of its position. Such evidence is absent from the *NPRM:*

- The Commission cites *no evidence* that any LEC has taken advantage of the "incentives and opportunities" to "leverage" its local exchange market power.
- The Commission cites *no evidence* that any LEC has driven its non-wireline competitor out of business.
- The Commission cites *no evidence* that any non-structurally-separated LEC has been able to capitalize on its "market power" in any way.

BellSouth suggests that the BOC cellular structural separation rule has very likely had a minimal effect, if any, on market shares. *What the rule has done is reduce price competition.* The rule burdens a BOC with costs that make it less able to engage in vigorous price competition with its non-BOC competitor. As a result, the non-BOC competitor does not have to compete on price to maintain a roughly equal market share. In the absence of a structural separation requirement, both competitors would have incentives to reduce prices somewhat, and as a result their market share would likely remain about equal. *Thus, the structural separation requirement imposed on the BOC benefits the non-BOC competitor, but impairs competition and deprives customers of more efficiently-priced service.*

With the advent of PCS, the same effect will occur—imposing structural separation on one of several competitors will impair competition, benefitting the other competitors at the expense of consumers. In fact, it will benefit the competitors already having a technological advantage. The FCC has characterized PCS as "the next generation of wireless mobile telephone service similar to, but more advanced than, cellular telephones."[112] Thus, imposing restrictions on BOC cellular operations will handicap the less-technologically-advanced competitor, which will seriously skew the competitive playing field.

Moreover, as the Commission acknowledges, integrated BOC LEC-cellular operation could realize efficiencies that could promote higher-quality, lower-cost service to subscribers.[113] There is no evidence that a BOC would possess unique incentives and opportunities to favor its own cellular operations over competitors or potential competitors. Such anticompetitive acts would backfire, because they would promptly be brought to the Commission's attention and would result in prompt enforcement action.

Indeed, BOCs have the least incentive of all LECs to engage in such anticompetitive acts, particularly during the transitional period before implementation of the provision of the 1996 Telecom Act. The BOCs have a *disincentive* to engage in monopoly leverage or other similar anticompetitive acts because they are in the process of seeking authorization to enter the interLATA market, pursuant to Section 271. Engaging in anticompetitive activities relating to local competition might provide a basis for denying a BOC's application for interLATA entry or for revoking the BOC's authorization to provide interLATA service. Thus, Section 271 removes any incentives that

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[112] Opposition of the Federal Communications Commission to National Telecom's Emergency Motion for Stay, *Cincinnati Bell Telephone Company v. FCC*, Case No. 96-3756, at 2 (filed Aug. 6, 1996).

[113] *NPRM* at ¶ 48.

BOCs might otherwise have to engage in leveraging their "monopoly" local exchange market power for the advantage of their cellular operations.

In light of the 1996 Telecom Act, and particularly Section 271, the Commission's concern about BOCs having "an integrated double incumbency (BOC cellular and local exchange operations)"[114] is a red herring. The Telecom Act gives BOCs every incentive to *facilitate* local competition and to *avoid* discriminatory or anticompetitive conduct. Moreover, the interconnection provisions of Sections 251-52 and the *Interconnection Order* fully address any concerns regarding BOC personnel commonly tasked with interconnection issues for cellular, PCS, and other local exchange competitors.[115]

(e) Costs and Benefits of Integrated vs. Structurally Separated Operations

The *NPRM* acknowledges, in paragraph 50, that structural separation requirements "place costs on the BOCs that are not borne by any other CMRS market participants." The Commission asks whether those costs are removed due to the fact that Section 601(d) of the Telecom Act permits the BOCs (and others) to engage in joint marketing and thus offer customers "one stop shopping."[116]

Section 601(d) does *not* remove the cost of structural separation. The structural separation rule continues to impose the same costs on BOCs even after the enactment of Section 601(d). Merely allowing BOCs and their cellular affiliates to resell each others' services does nothing to remove such costs; the extra layer of personnel and corporate structure imposed by structural separation continues, resulting in unnecessary costs. Section 601(d) gives BOCs some flexibility to address customer needs, but it does not affect the cost of maintaining separate organizations.

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114 *NPRM* at ¶ 49.

115 *See id.*

116 *See id.* at ¶ 50.

5. Out-Of-Region Relief From Section 22.903 Is Necessary But Insufficient

BellSouth agrees with the Commission's determination that there is no basis for imposing structural separation on out-of-region BOC cellular operations, and with the relief granted in the waiver order contained in the *NPRM*.[117] As shown elsewhere in these Comments, however, there is similarly no justification for imposing structural separation on in-region operations.

As a practical matter, the proposed relief will have little effect. Continuing to impose a structural separation requirement on in-region cellular operations will effectively subject out-of-region operations to the same requirement, because few BOCs will be willing to establish two wholly separate cellular organizations, one separated and one not.

C. Section 601(d) of the 1996 Act Bars the Commission From Adopting Rules Restricting Joint Marketing and Sale of CMRS and Other Services

Section 601(d) of the Telecom Act permits joint marketing and sale of CMRS and other services by a BOC or any other company "[n]otwithstanding section 22.903 . . . or *any other* Commission regulation." Accordingly, the Commission is not authorized to adopt a regulation that restricts the activities authorized by Section 601(d). Moreover, Section 601(d) is necessarily self-executing, because it denies the Commission the authority to adopt regulations that limit joint marketing and sale of CMRS and other services. As a result, BellSouth opposes the adoption of any rules concerning joint marketing and sale of CMRS and other services.

Representative Burr, the author of this provision, made clear that its principal purpose was to permit the BOCs to sell cellular service on the same basis as any other company:

> [T]ogether with other provisions in the bill, *this amendment will help to put the [BOCs] on par with their competitors* by allowing them to resell cellular services—including the provision of inter-

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[117] *See NPRM* at ¶¶ 54-57.

> LATA cellular services—in conjunctions [sic] with local exchange services and other wireless services—that is, PCS services—that they are already permitted to provide.
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> . . . .
>
> *In order to ensure that all carriers can offer similar service packages,* language has been included in the amendment to supersede language in [the AT&T-McCaw] decree. *As a result, AT&T and others will be able to sell cellular services on the same terms as the Bell companies.* Specifically, *all carriers* would be able to sell cellular services, including interLATA cellular services, along with local landline exchange offerings.[118]

It is clear from Rep. Burr's remarks that Section 601(d) permits BOCs, AT&T, and all other companies to sell and market cellular service on the same terms. The statute does not require the use of any particular organizational structure for BOCs in particular to engage in the sale and marketing of cellular service. Other companies are not required to establish structurally separated or unseparated affiliates, divisions, or other staff units to sell and market cellular service; likewise BOCs are not required to do so. Like other companies, BOCs have the right to decide which employees and staff units will sell and market cellular service; they can use the same employees that sell residential local exchange service or business service, or they may establish a separate sales organization. Similarly, BOCs, like other companies, are free to sell or market cellular service as agents, resellers, dealers, or in some other capacity. Likewise, BOCs are under no obligation to sell or market cellular service only to local exchange service customers or only in a bundle with local exchange service; they are free to sell and market cellular service to any customer or potential customer they wish, and may sell it as a stand-alone product or may also offer it as part of a package,

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[118] 141 Cong. Rec. H8456 (daily ed. Aug. 4, 1995) (remarks of Rep. Burr) (emphasis added).

just as any other company may do.[119] As Rep. Burr stated, the statute places BOCs and other companies "on par" and allows all to sell and market cellular service "on the same terms."[120]

1. Joint Marketing and Promotion

BellSouth agrees with the Commission that "jointly market and sell" is broadly permissive, including "advertising, promotion, and sale, at a single point of contact," as well as "promotion, advertising, and in-bound service marketing."[121] BellSouth also agrees with the Commission that joint marketing and sale includes activities "such as joint installation, maintenance, and repair of BOC cellular and landline local exchange services," as well as billing and collection.[122] BellSouth submits, however, that the phrase is not limited to such activities, and that the Commission lacks authority to adopt rules that restrict BOCs or others from engaging in other joint marketing and sales activities. BellSouth agrees with the Commission that *at a minimum* § 601(d) authorizes the BOCs to engage in joint sale and promotion of cellular and landline service.

BellSouth strongly disagrees, however, with the Commission's view that any such joint marketing by the BOC "be done on behalf of the separate affiliate."[123] The statute contains no such requirement. Instead, it gives BOCs the same ability to sell and market cellular service as any other company has. Requiring the BOC to sell and market cellular service only as the agent or

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119 The Commission has previously found that there are substantial benefits to the public in offering discounted bundles of cellular service with equipment, "provided that the service is also offered separately at a nondiscriminatory price." *Bundling of Cellular Customer Premises Equipment and Cellular Service*, 7 F.C.C.R. 4028, 4032 (1992). Similarly, the fact that Congress authorized BOCs and others to offer bundled cellular and local exchange service as part of their "one-stop shopping" programs does not mean that such services may *only* be offered as part of a bundle. One-stop shopping does not require carriers to offer service only as a package deal, but rather gives carriers the ability to offer consumers choices at a single point of contact, which may include bundled services.

120 141 Cong. Rec. at H8456.

121 *NPRM* at ¶ 64.

122 *Id.* at ¶ 68.

123 *Id.* at ¶ 64.

representative of the separate affiliate would violate the plain terms of the statute and would contravene the Congressional intent, as stated by the sponsor of the provision. Moreover, requiring that the BOC act "on behalf of the separate affiliate" would preclude the BOC from reselling cellular service, because a reseller offers service on its own account as a resale carrier, not on behalf of the underlying carrier from which it purchases bulk service. Indeed, the Commission expressly recognized that Section 601(d) specifically permits the BOC to resell the affiliate's cellular service.[124]

BellSouth agrees with the *NPRM*'s proposal that a BOC selling and marketing its affiliate's cellular service (if an affiliate is used) should be subject to the affiliate transaction rules and that this should be classified as a non-regulated activity, on a compensatory, arms' length basis.[125] BellSouth disagrees, however, with the suggestion that Section 272(b)(5) has any bearing on such transactions. Section 272(b)(5) addresses the separation requirements imposed on the statutorily required interLATA separate affiliate and is not relevant to cellular (or other CMRS) service, which is not subject to a statutory separate affiliate requirement. BellSouth also disagrees with the suggestion that the sales and marketing arrangements between a LEC and a cellular affiliate must be reduced to writing. Congress expressly stated which arrangements between a BOC and its affiliates must be reduced to writing, as it did in Section 272(b)(5). The fact that Congress authorized BOC marketing and sale of CMRS without expressing any intention that such joint marketing arrangements be reduced to writing is conclusive evidence that these activities are not subject to such a requirement.

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124 *Id.* at ¶ 63.

125 *Id.* at ¶ 64.

2. Direct Sale of CMRS and Landline Services

While the *NPRM* acknowledges that Section 601(d) clearly permits the "[i]ntegrated sales and marketing of resold cellular and incumbent LEC landline local exchange service," it seeks comment on how to implement the statute and whether conditions should be imposed on BOC *resale* of cellular service.[126] The simple answer is that Section 601(d) specifically permits a BOC or any other person (including a BOC cellular affiliate) to engage in the integrated sale and marketing of CMRS and landline services, notwithstanding any Commission regulation. The statute makes no distinction between different modes of sale and marketing, such as resale or agency arrangements. Under the express terms of the statute, the Commission cannot prohibit direct sales of integrated service by either the BOC or its cellular affiliate (if there is such an affiliate), through resale, agency, or otherwise.[127]

BellSouth agrees with the Commission that activities such as "joint installation, maintenance, and repair of BOC cellular and landline local exchange services" and "billing and collection" fall within the scope of joint marketing and sale.[128] Under Section 601, all such joint marketing and

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126 *Id.* at ¶ 67.

127 There is no need for the Commission to consider the record compiled in response to BellSouth's withdrawn cellular resale waiver request in this connection. The objections on policy grounds to BellSouth's resale request have been rendered moot by passage of Section 601. In any event, those objections did not state a valid basis for concern relating to discriminatory resale practices, but raised only hypothetical concerns. In particular, there is no basis for believing that there is any likelihood that BOC cellular entities would offer the BOC "'one-of-a-kind' volume discounts for cellular service"—this was a speculative concern raised in objections, without any factual basis. There is certainly no need for regulations or conditions to prevent such discounts. BOC cellular licensees, like all cellular licensees, are prohibited from unjust and unreasonable discrimination by Section 202(a) of the Act. Accordingly, there is no greater need for special conditions on BOCs' resale of their affiliates' cellular service than there is for such conditions on AT&T reselling AT&T Wireless cellular service. Similarly, there are no special circumstances warranting any more public disclosure of a BOC's cellular affiliate's rates, terms, and conditions than is the case with AT&T Wireless or any other cellular licensee that may be selling to an affiliated company for resale.

128 *Id.* at ¶ 68.

sales activities are permitted notwithstanding any Commission regulation. Accordingly, the Commission may not adopt regulations that restrict or prevent such activities. BellSouth agrees with the Commission that such activities should be subject to affiliate transaction rules, to the extent a separate affiliate is used.

3. Privacy of Customer Information; CPNI Requirements

The Commission seeks comment on what changes to Section 22.903 are needed with respect to customer proprietary network information ("CPNI"), in light of the enactment of Section 222 of the Act, as part of the Telecom Act.[129] BellSouth believes Section 22.903 should be eliminated in its entirety immediately, which renders the question moot. There should be no special rules for CPNI relating to wireless services. Section 222 and its implementing regulations should govern CPNI in the context of all telecommunications services offered by a carrier, including cellular and other CMRS offerings.

The Commission also asks whether it should require any particular organizational structure for BOCs selling or marketing cellular service, in light of Section 222 of the Act and Section 601(d) of the Telecom Act.[130] It should not and indeed cannot. As discussed above, Section 601(d) permits BOCs and all other companies to sell and market cellular service notwithstanding any Commission rule to the contrary. Accordingly, the Commission lacks the statutory authority to prescribe an organizational structure that would forbid particular types of BOC entities from selling and marketing cellular service.

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129 *Id.* at ¶ 72.

130 *Id.* at ¶ 73.

4. Section 251(c)(5); Network Information Disclosure

BellSouth agrees with the Commission's tentative conclusion that no cellular-specific network disclosure requirements should be imposed on BOC LECs.[131] This is fully addressed by Section 251 and the *Interconnection Order.*

D. The Commission Should Eliminate Section 22.903 Immediately and In Its Entirety (Option 2), Because There Is No Lawful Basis for Retaining It Until a "Sunset" Date (Option 1)

The Commission is considering two options for elimination of Section 22.903. The first option would leave the rule in effect until a "sunset" date—namely, a BOC would remain subject to the structural separation requirement until it receives "authorization pursuant to Section 271(d) to provide interLATA service originating in any in-region State."[132] The second option would be to eliminate the rule immediately. BellSouth submits that the Commission must adopt option 2 and eliminate the rule immediately.

The Commission notes that the Telecom Act imposes a variety of sunset periods on the structural separation requirements contained therein, such as the Section 272 transition rules, Section 271 checklist, and Section 274 electronic publishing transition rules.[133] All of these statutory transition periods are irrelevant to the question at hand, because these sunset provisions are part and parcel of particular legislative judgments as to the degree and duration of discrete and service-specific statutory structural safeguards. There is no statutory structural safeguard prescribed for BOC cellular service.

Indeed, Congress expected the Commission to eliminate the cellular structural separation requirement. Congress could have mandated retention of § 22.903 for some specific time and did

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131 *Id.* at ¶ 76.

132 *Id.* at ¶ 80.

133 *Id.* at ¶ 78.

not. In fact, the legislative history indicates that Congress expected the Commission to eliminate Section 22.903 promptly, in light of the Sixth Circuit's decision. The Conference Report states that structural restrictions on AT&T resulting from the then-pending AT&T-McCaw consent decree were eliminated because the Sixth Circuit decision rendered the restrictions unnecessary to maintain parity with the BOCs,[134] and a statement by Rep. Burr on the House floor shortly before passage of the Conference Report confirms that Congress expected the Commission to eliminate Section 22.903 promptly in light of the Sixth Circuit's decision:

> It simply makes no sense to require Bell cellular operations to remain in separate subsidiaries—and prohibited from joint marketing opportunities—when the Commission has determined that no such requirements are necessary for Bell PCS operations. . . .
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> . . . .
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> . . . It is my hope, that after 14 years and a clear rebuke from the court, the FCC will take the next step and review its cellular separate subsidiary rule.[135]

Under these circumstances, the Commission cannot rely on the existence of sunset clauses contained in various provisions of the Telecom Act as a basis for continuing Section 22.903 in force. Congress did not endorse the continuation of the rule and in fact expected the Commission to respond promptly to the Sixth Circuit's decision by eliminating it.

Furthermore, the Commission's specific Option 1 proposal, which would continue the BOC structural separation requirement in force until a BOC has been authorized under Section 271(d) "to provide interLATA service originating in any in-region state,"[136] simply makes no sense. Section 271(d) permits a BOC to provide interLATA service when (1) there is a *non-cellular* facilities-based

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134 *See* H.R. Conf. Rep. No. 104-458 at 199 (Jan. 31, 1996) ("Finally, a recent decision of the Sixth Circuit, *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752 (6th Cir. 1995), may lead to the removal of the separate subsidiary requirement for other cellular businesses. Accordingly, there is little reason to keep the McCaw Consent Decree in place.").

135 142 Cong. Rec. H1155 (daily ed. Feb. 1, 1996) (remarks of Rep. Burr).

136 *NPRM* at ¶ 80.

competitor with whom it has entered into an interconnection agreement (or there has been no request for interconnection from a facilities based competitor despite the availability of such interconnection); (2) the BOC has satisfied a series of requirements contained in a "competitive checklist;" and (3) the Commission determines, after consultation with the Attorney General and state regulators, that the BOC's entry into interLATA service will serve the public interest.[137] Satisfaction of these requirements has *nothing* to do with whether the BOC should be able to provide cellular service without structural separation. This very point was made in a letter sent to Chairman Hundt by Rep. Charles Taylor:

> The checklist was created by Congress to address the ability of the BOCs to provide long distance and to engage in manufacturing. It was never intended to address this issue [sunset of the cellular structural separation rule].[138]

Indeed, Congress made clear that it did *not* consider cellular-LEC competition to be a relevant factor in the Section 271 analysis: Section 271(c)(1)(A) states that "for the purpose of this subparagraph, services provided pursuant to subpart K of part 22 of the Commission's regulations (47 C.F.R. 22.901 et seq.) shall not be considered to be telephone exchange services." It would be highly inappropriate—and directly contrary to Congressional intent—for the Commission to link expiration of the BOC cellular structural separation rule to a determination that explicitly excludes consideration of cellular-LEC competition.

The fact that Option 1 would leave the BOC cellular structural separation rule in place only for an interim transition period does not affect the FCC's obligation to engage in reasoned decisionmaking. The Commission cannot "immunize [a rule] from review" by calling it an

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137 *See* 47 U.S.C. § 271(c)-(d).

138 Letter dated May 31, 1996, from Rep. Charles Taylor to the Honorable Reed Hundt, Chairman, FCC.